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# Conceptions of the Common Law: Reflections on a Theory of Contract

Vincent A. Wellman

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## Conceptions of the Common Law: Reflections on a Theory of Contract

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### I. INTRODUCTION

Legal scholarship has lately witnessed a revival of interest in the foundations of the common law. Some writers have sought to justify the common law as a whole.<sup>1</sup> Others have advanced theories of one

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1. Ronald Dworkin has been the chief evangelist, propounding a rights-based theory of law and a corresponding obligation of judges to consider moral precepts when deciding significant cases. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-130 (rev. ed.

or another of the common law's subdivisions—torts,<sup>2</sup> for instance, or contract. A theory of this latter type might seek, for example, to explain why the common law includes contract as one of its parts; as part of that effort it would also try to organize important cases and doctrines of contract law into a coherent whole.

This article examines what is involved in developing a theory of one of the common law's subdivisions and advances three claims. First, a theorist begins with an intellectual picture or model of her subject.<sup>3</sup> To explain the law of contract—or torts, or whatever subdivision for which she hopes to account—the theorist must differentiate contract from the rest of the common law. She must, in other words, identify the features of contract that make it special and that need explanation. She must also provide criteria for classifying particular issues as belonging in contract or elsewhere in the common law. The picture or model that guides the theorist in differentiating and classifying the doctrines and cases her theory might explain is what I call a *conception*. Second, I argue that we can understand a theorist's approach to her subject by identifying the conception (or conceptions) on which she relies in developing her theory.<sup>4</sup> How one might try to rationalize the cases and doctrines of contract law will depend on how one differentiates contract from the rest of the common law and how one classifies legal controversies as belonging properly to contract law or to some other part of the law. Finally, the theorist's conception will imply criteria for evaluating the success of her theory.<sup>5</sup> Lawyers and scholars can judge, in terms of the theorist's conception, whether she has explained the cases and doctrines that, according to her conception, ought to be explained by an adequate theory of contract.

My argument for these claims proceeds at two levels. First, at an abstract and general level, I elaborate in Section II the idea of a theo-

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1977). Dworkin's lead has been followed by others, preaching a variety of creeds. In law and economics, for example, Richard Posner has argued that wealth maximization—what Posner terms the "efficiency norm"—provides an ethical basis for the common law. See Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). Rejecting Posner's wealth maximization norm, Anthony Kronman has advanced what he calls the Paretianist criterion, claiming that we may account for some particular common law doctrine in terms of the long run benefit to those who are temporarily disadvantaged by the doctrine's application. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

2. Jules Coleman has reviewed and analyzed a variety of theories that attempt to provide a moral account of tort law. See Coleman, *Moral Theories of Torts: Their Scope and Limits, Parts I & II*, 1 LAW & PHIL. 371 (1982); 2 *id.* at 5 (1983).

3. See *infra* text accompanying note 16.

4. See *infra* text accompanying note 17.

5. *Id.*

rist's conception and relate this idea to some basic principles of theory formation and evaluation.<sup>6</sup> I also explain in the same section why recognizing the theorist's conception is especially significant for evaluating theories of one of the common law's subdivisions.

In the remainder of the article I demonstrate my claims in the context of a detailed examination of Charles Fried's theory of contract,<sup>7</sup> which for several reasons has received a great deal of scholarly attention.<sup>8</sup> Section III outlines Fried's view of contract law. He maintains that contract is based on the moral obligation to keep one's promises and that contract's doctrines reflect that obligation.<sup>9</sup> I argue that Fried relies, at different points in his discussion, on three *different* conceptions of contract law—the Simple, the Legal Process, and the Teleological—each of which has been used by lawyers and scholars.<sup>10</sup> Sections IV, V, and VI expound upon these three conceptions in turn and show, by analyzing Fried's argument, the respective strengths and weaknesses of each conception.<sup>11</sup>

While I discuss, in Section VII, some general criteria for an adequate theory of one of the common law's parts,<sup>12</sup> I do not attempt to show that one conception is better than its rivals for explaining contract law. My aim in this article is to highlight the significance of the writer's conception for theory building. Legal scholars have not generally sought to articulate or defend the conceptions they use, and this failure hampers their efforts to develop theories of the common law's various parts. Fried, for example, does not defend the conceptions on which he relies.<sup>13</sup> In fact, he employs each of these three conceptions

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6. See *infra* text accompanying notes 14-22.

7. C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

8. See, e.g., J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 189-93, *passim* (1984); Macneil, *Values in Contract: Internal & External*, 78 NW. U.L. REV. 340, 390-97 (1983); Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404 (1981); Atiyah, *Book Review*, 95 HARV. L. REV. 509 (1981).

9. See *infra* text accompanying notes 23-33.

10. See *infra* text accompanying notes 35-41 (use of the Simple conception), notes 76-79 (use of the Legal Process conception) & notes 118-25 (use of the Teleological conception).

11. See *infra* text accompanying notes 34-74 (the Simple conception), notes 75-117 (the Legal Process conception) & notes 118-58 (the Teleological conception).

12. See *infra* text accompanying note 160.

13. Fried does express concern about the extent to which his view of contract is challenged by other, related principles of obligation. Thus, for example, he considers the extent to which his view is compatible with a reliance principle, see C. FRIED, *supra* note 7, at 21-25, 54-56; and with a restitutionary principle, *id.* at 21-25, 55, 115-18. His argument that promissory liability can coexist with other sources of obligation therefore implies a position about the boundaries of contract vis-a-vis the rest of the common law—namely, that contract, properly so called, should be understood restrictively so as to avoid conflict with those other principles. See, e.g., *id.* at 25. But he does not extend this discussion so as to articulate the range of

in his argument without recognizing their important differences. I contend that his failure to distinguish among the different conceptions and their respective criteria for an adequate theory ultimately undermines his enterprise. We should expect comparable difficulties to plague any theory of the subdivisions of common law that fails to address these issues.

## II. THE IMPORTANCE OF A CONCEPTION

The effort to develop a theory that justifies one part of the common law implicates questions about the nature and adequacy of a legal theory, similar to questions of theory formation and evaluation in the philosophy of science. A theory is ordinarily advanced to organize the relevant phenomena, so as to illuminate aspects of the subject matter that would otherwise be obscure or problematic.<sup>14</sup> But, a theorist's hypotheses hardly emerge *ex nihilo*. She begins, rather, from a pretheoretical conception of her subject.<sup>15</sup> This intellectual model guides the theorist in formulating her initial hypotheses about how best to explain or justify her topic. It also delimits, either directly or implicitly, the range of the phenomena to be explained by the theory.

The theorist's conception of her subject matter plays an impor-

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phenomena that, on his view, an adequate theory of contract should explain. His position on this latter question must be extracted from his various analyses. See *infra* text accompanying notes 42-53, 84-90 & 126-42.

14. "What is it to supply a theory? It is to offer an intelligible, systematic, conceptual pattern for the observed data. The value of this pattern lies in its capacity to unite phenomena which, without the theory, are either surprising, anomalous, or wholly unnoticed." N. HANSON, *PATTERNS OF DISCOVERY* 121 (1958). Legal scholars have not commonly thought of their analyses as directed towards the production of a *theory*; perhaps as a result they have not often tried to use the contributions of philosophy of science to illuminate their legal research. There are a few notable exceptions. See, e.g., Hart, *Definition and Theory in Jurisprudence*, 70 *LAW Q. REV.* 37 (1954); Schauer, *An Essay on Constitutional Language*, 29 *UCLA L. REV.* 797, 814-28 (1982); Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 *U. COLO. L. REV.* 45 (1985).

15. The issues that this article discusses in terms of the theorist's conception of her subject matter are more commonly examined in the literature of philosophy of science in terms of the epistemic or cognitive significance of the theorist's *model*. For a classic discussion of the importance of a model for theory formation, see E. NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* 106-17 (1961). The most provocative discussions of the significance of the theorist's conception are to be found in the claims of writers who suggest that the resulting theory is, in some important way, *fixed* by the pretheoretical conception. For example, Norwood Hanson has suggested that when two theorists work from different conceptions, they are not even observing the same phenomena. See N. HANSON, *supra* note 14, at 4-19. Similarly, in commenting on the importance of what he calls the theorist's "paradigm," Thomas Kuhn sometimes seems to be claiming that theories that result from different paradigms are fundamentally incommensurable. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 111-35 (2d ed. 1970).

tant role in the development of her theory. Her conception provides criteria for classifying the observable phenomena into different categories and differentiating her subject from all other phenomena. The contract theorist will therefore depend on her conception of contract to differentiate from the welter of law those cases and doctrines that are the data to be explained by her theory.<sup>16</sup> Her conception will also indicate the features of contract that distinguish it from the rest of the common law and that require their own special explanation or justification.

The theorist's conception is also an important focus for the responses of others to the proffered theory. Lawyers and scholars can gain insight into the theorist's approach to her subject by identifying her conception. A theorist begins with some conception or other of her subject matter, but no one conception is determined by the data. Rather, there may be a variety of possible conceptions that a theorist might use in developing her account.<sup>17</sup> The particular conception (or conceptions) that a given writer employs will shape the set of cases and doctrines that the theory aims to justify. Therefore, recognizing the theorist's conception as a starting point for the development of her theory can help us understand why the theory has the structure that it has. Moreover, the theorist's conception will imply criteria for evaluating her theory. Because the theorist's conception identifies those elements of law that her theory ought to explain, we can assess whether the resulting theory has, in fact, explained adequately the cases and doctrines that, on the theorist's own conception of her subject, ought to be explained. In other words, we can determine if the theory meets the theorist's ambitions.

At some level of generality, my points about the significance of a conception of the common law should be unsurprising. Any account, whether of law or some other enterprise, will proceed from a pretheoretical characterization of the phenomena to be explained. Moreover, our evaluations of the resulting theory's adequacy may depend, in various ways, on just how the theorist has characterized the phenomena.<sup>18</sup> Among other things, her pretheoretical characterizations

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16. I take it for granted in this article that the data of a legal theory of some aspect of the common law will necessarily include some of what we traditionally regard as law, i.e., cases, rules, principles, trends, and the like.

17. Philosophers of science elaborate on this idea by pointing to the *underdetermination* of a theory with respect to its data. For a discussion of the concept of underdetermination in natural science, see C. GLYMOUR, *THEORY AND EVIDENCE* 30-31 (1980). For applications of the concept to topics in legal theory, see Schauer, *supra* note 14; Wellman, *supra* note 14, at 61-62.

18. *Cf.*, e.g., E. NAGEL, *supra* note 15, at 115.

and discriminations of the data may have obscured significant regularities in the phenomena. Or, her characterization may have led the theorist to overlook crucial distinctions. Finally, any theory should be liable to challenge if some important issues were surreptitiously resolved when the theorist stipulated the range of phenomena to be explained. Thus, any theory's power and appeal may in several respects depend on how the theorist conceives of the phenomena, and we gain insight into the theory's limits and usefulness by examining the theorist's starting points.

Legal theory is not different in these respects from any other intellectual enterprise, and accounts of the common law's subdivisions would be prey to the same difficulties and objections as other types of theories. We would normally expect, however, that as part of the task of refining and defending her theory, the theorist would come to review the conception on which she relies.<sup>19</sup> Along these lines, an adequate theory of one of the common law's parts would be understood as one for which the legal phenomena to be explained could be defensibly distinguished from other, unanalyzed aspects of law. While we might anticipate that the pretheoretical characterization of the subject matter could influence the theory's focus, we would ordinarily expect that the initial conception's limitations would come to be examined as part of the theory's development. In the normal course of a theory's development, therefore, those limitations would be exposed and the resulting theory should not be limited by the defects of the theorist's conception.

Unfortunately, theorists who have sought to explain parts of the common law have not discussed their subject's distinctiveness, nor their criteria for classification.<sup>20</sup> What warrants selecting some

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19. For a useful account of how this review and reappraisal might proceed for a model in the development of a physical theory, see Spector, *Models and Theories*, in *READINGS IN THE PHILOSOPHY OF SCIENCE* 276, 287-90 (B. Brody ed. 1970).

20. There are some notable exceptions. In his early writings, Oliver Wendell Holmes showed a keen sensitivity to these problems. For example, he contrasted the propriety of contract as a distinct legal subject with that of telegraphs:

Rules of law, therefore, must be grouped with reference to some set of facts or other. The effort of a text-writer or codifier should be to seize those of which the presence is necessary to bring into operation a distinct rule of law. Thus, *contract* is a proper head, because the fact that a certain agreement has been made, has attached to it a series of legal consequences which would not exist without it. . . .

Telegraphs, on the other hand, is not a proper head under which to collect what is generally included there, because most of the cases stated are simply illustrations of the law of principal and agent or of contract, if the decisions are right. The circumstance that a telegraphic company was concerned is purely dramatic, and has no legal significance.

authorities, doctrines, or trends, but not others, as part of the data that an adequate theory of contract should explain? Why does the theorist suppose that contract is different from tort? To the extent that different and competing conceptions can be identified at work in various accounts of common law subjects, few theorists have pursued the important differences among the various competitors.<sup>21</sup> This general problem is underscored for theories of one of the common law's subdivisions by the fact that a theory of a particular area of the common law presupposes that area's distinctiveness.<sup>22</sup> In attempting to

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JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 60-61 (H. Shriver ed. 1936). Justice Holmes had earlier objected on the same grounds to books on the law of torts, *id.* at 45, but later came to believe that torts exemplified a sufficient degree of conceptual coherence to qualify as a proper topic. See Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873), reprinted in THE FORMATIVE ESSAYS OF JUSTICE HOLMES 117 (F. Kellogg ed. 1984).

21. Some legal theorists have recently sought to articulate different conceptions of the law that might be important in legal decisions. See, e.g., Summers, *Working Conceptions of "The Law,"* 1 LAW & PHIL. 263 (1982). Ronald Dworkin has, in a variety of writings, pointed to salient conceptions of the law that, he argues, influence the way in which lawyers and scholars respond to questions about the proper role of judges in a legal system. See R. DWORKIN, *supra* note 1, at 82-130; R. DWORKIN, A MATTER OF PRINCIPLE 11-32 (1985); R. DWORKIN, LAW'S EMPIRE 6-11, *passim* (1986). Neither Summers nor Dworkin, however, has explicitly formulated his ideas about conceptions of the law in a way that could be applied to the task of theorizing about one of the common law's subdivisions.

22. I do not mean to imply that problems of differentiation and classification are not important elsewhere in legal theory. There are, for example, interesting questions about how properly to distinguish common law from other forms of law, questions that parallel the concerns of this article about developing a theory of one of the common law's subdivisions. See, e.g., G. CALABRESI, A COMMON LAW FUNCTION FOR THE AGE OF STATUTES (1982); Atiyah, *Common Law and Statutes*, 48 MOD. L. REV. 1 (1985). These issues would be significant for any theory of the common law that posits a sharp division between common and other law; and they might also be important to a theory of comparative law. Moreover, there are judicial decisions that are difficult to classify: are they part of the common law or are they something different? For example, certain cases are sometimes said to be decided "in the equity of a statute." See, e.g., Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934). Other decisions invoke judicially fashioned maxims of statutory construction, such as the maxim that statutes in derogation of the common law should be "strictly" construed. See, e.g., O. HETZEL, LEGISLATIVE LAW AND PROCESS 329-56 (1980). These decisions are problematic because they appear to embody, on the one hand, the kind of judicial role commonly envisioned for the common law and yet, on the other hand, invoke the sort of justification or legitimacy commonly associated with legislation.

A theory that sought to differentiate the common law from other types of law would have to rely on some basis or other to distinguish the common law, properly so called, and establish some criteria to classify problematic decisions as common law or other law. A theory with this ambition would therefore be haunted by the issues of differentiation and classification that, I argue, trouble accounts of the common law's subdivisions. However, there can be a variety of different theories of the common law, and many of these may escape the quandaries of differentiation and classification. Among other things, the legal community's use of the term "common law" is so diverse that different theories of the common law may have widely divergent objectives. For example, a theorist of the common law may seek to explain legal norms that derive from judicial decisions, as opposed to norms that are legislative or



explain one of the common law's subdivisions, the theorist relies on a conception that distinguishes that subdivision from the rest. But a failure to reexamine the adequacy of her basis for differentiation and classification calls into question her effort to provide a special account of that part of the common law. Finally, the significance of a theorist's conception is of vital importance when examining theories that attempt to *justify* some part of the common law. Theories of this kind argue that certain moral norms might explain the cases, doctrines, or trends of that part of the law. But whether contract—or any other subdivision of the common law—should be seen as moral depends on how the theorist conceives of that subdivision of the common law.

In sum, a theorist begins with some conception or other of her subject matter, and the particular conception on which she relies can have important consequences for the structure and adequacy of the resulting theory. This is true for any intellectual enterprise, but it is of especial significance for theories of one of the common law's subdivisions. The following sections of this article demonstrate these points through an examination of Fried's theory that contract is based on the moral obligation to keep one's promises.

### III. FRIED'S THEORY OF CONTRACT

It is central to *Contract as Promise* that contract be recognized as having a distinct nature and legal structure; it is not just some casual topic for examination. Fried articulates twin ambitions for his work: "At the level of theory I hope to show that the law of contract does have an underlying, unifying structure, and at the level of doctrinal exposition I hope to show that that structure can be referred to moral principles."<sup>23</sup>

More specifically, he focuses on what he calls the *promise principle*—"that principle by which persons may impose on themselves obligations where none existed before."<sup>24</sup> In promising, Fried argues,

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constitutional in origin. She may, as a result, propound a theory of the "common law," relying on the common law's traditionally acknowledged decisional nature. For a theory of this type, the boundaries that separate common law from other sorts of law and the proper classification of some of the problematic decisions noted above may be less central than other issues relating to the legitimacy within a democratic system of judicially created norms. Alternatively, a theorist may be interested in the historical development of the common law of England, or the parallels in legal development of different American states. That is, the theorist could be drawn to consider the factors that lead to convergent development of law in different jurisdictions. A theory that sought to explain the "common law" in the sense of such common legal developments would also not be troubled by the problems of classification and differentiation that I have noted.

23. C. FRIED, *supra* note 7, at i.

24. *Id.* at 1.

we intentionally invoke a social convention whose function it is to give moral grounds to others to rely on our promises.<sup>25</sup> It is wrong to invoke the convention in order to make the promise, and then to break it,<sup>26</sup> and we therefore incur a moral obligation to do as we have promised. It is this moral obligation to keep our promises that Fried asserts to be the "moral basis" of contract law.<sup>27</sup> Because the moral obligation to keep one's promise is distinct from other common law principles, Fried is claiming that contract has its own special place in any liberal theory of law.

There are three reasons why *Contract as Promise* is notable within legal scholarship and deserving of special attention. First, the argument about contract's relation to promise-keeping is developed in great detail. Indeed, while I maintain that Fried's argument is unsuccessful, his claim of a connection between contract and promise-keeping is at least initially plausible. Lawyers and judges would tend to agree that promising is important to contract. The Restatement of Contracts, an effort by contract scholars to articulate the basic structure of contract law, confirms this connection: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."<sup>28</sup> After stating his account of the moral force of promising, Fried takes pains to relate several authorities and rules of the law of contracts to the promise principle. In a series of sometimes intricate discussions he reviews elements of the traditional collection of contract doctrines: contract formation, enforceability, performance, the residual gap-fillers, and remedies. By working from the morass of actual contract law he develops the promise principle into a theoretical structure that might rationalize contract, as he identifies it, and account for its distinctiveness.

Second, Fried's enterprise is notable in that his argument revives what legal scholarship has come to call the *subjective* or *will* theory of contract,<sup>29</sup> which urges that contractual liability be imposed because, and only to the extent that, the individual has voluntarily undertaken such liability. On Fried's version, the promisor is liable because he has deliberately invoked the convention of promising and thereby

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25. *Id.* at 16.

26. *Id.* at 17.

27. *Id.* at 1.

28. RESTATEMENT OF CONTRACTS § 1 (1932).

29. See, e.g., Farnsworth, "Meaning" in the *Law of Contracts*, 76 YALE L.J. 939, 942-46 (1967). Professor Patterson cites the German legal scholar Savigny as "[t]he classical exponent of the will theory for modern law." Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859, 861 (1928).

given the promisee moral grounds to rely on the promise. The will theory seems to have been more prominent over a century ago. Scholars and judges described a contract as a "meeting of the minds," and if, because the processes of contract formation failed in some way, the minds had not met, then there was no contract.<sup>30</sup> But, the will theory fell from favor thereafter, and contract scholars shifted from an individualistic understanding of contractual liability to a view of contract that is sometimes referred to as an objective theory. On this latter view, the appropriate basis for imposing contractual liability was held to be the needs of society for an efficient and reliable regime of enforceable transactions. Liability might thus be imposed in some circumstances when the parties had not intended to make a contract—when, in other words, their minds had not met.<sup>31</sup> Thus, Fried's success would mean that contract scholarship could need significant revision.

Third, Fried's argument in favor of contract as a distinct part of the common law contrasts sharply with a line of modern scholarship that proclaims contract's death. This line of reasoning holds that contract, as modern lawyers think of it, is a recent legal development. Prior to the middle of the 19th century, the thesis runs, there was only a generalized law of obligations and a collection of subspecialties—particular types of agreements such as the law merchant, maritime law, and negotiable instruments, to name a few.<sup>32</sup> Contract emerged in response to the special legal needs of an entrepreneurial society. Those needs have since diminished, at least in comparison with other societal needs, and contract should be expected to wither and ultimately die. Its corpse will be reabsorbed back into the law of obligations, to mingle with and contribute its nutrients to tort. Contract's death has been announced or assumed by several distinguished scholars, especially a number of legal historians.<sup>33</sup> Fried rejects this contention; he seems determined to show that the rumors of contract's death are greatly exaggerated.

These three features make Fried's argument an apt focus for my discussion. It is controversial whether contract does indeed have a special and distinct place in the common law, and Fried's argument should therefore indicate the bases on which he proposes to identify the law of contracts. His decisions as to the proper boundaries of contract law will therefore be important to his thesis, and the detail of

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30. See Farnsworth, *supra* note 29, at 945.

31. See, e.g., *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

32. See, e.g., G. GILMORE, *THE DEATH OF CONTRACT* 8-12 (1974).

33. See, e.g., L. FRIEDMAN, *CONTRACT LAW IN AMERICA* (1965); G. GILMORE, *supra* note 32.

his discussion provides a variety of instances in which we may examine his inclusion or exclusion of relevant phenomena from the data to be explained. The fact that Fried is proposing a significant departure from the received view of contract law highlights the question of how a theorist selects the relevant phenomena for a theory of contract law. If the law of contracts as Fried identifies it is significantly different from the law as commonly recognized, how can we compare and evaluate the rival theories?

#### IV. CONTRACT LAW AS RULES AND CASES

##### A. *The Simple Conception*

From the standpoint of the Simple conception, the law of contracts consists of the standard structure of cases and rules which one finds in a traditional legal treatise.<sup>34</sup> An adequate theory of contract law would therefore explain the holdings in those standard cases that consider issues of contractual liability. It would agree with the rules that are stated in the treatises or the Restatement, rules that are frequently cited by courts as authority for their decisions.

Various aspects of legal practice support this conception. Legal treatises, law school curricula, and the services that report and annotate judicial decisions will commonly agree, at least as a matter of broad generality, on contract's doctrinal structure. A contract must be formed, and the process of agreement is usually controlled by rules that prescribe effective offers and acceptances.<sup>35</sup> There are certain requisites for the agreement to be enforceable: consideration or one of its substitutes, capacity of the parties, and absence of fraud, duress,

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34. *Accord* N. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW & RIGHTS 1-5 (1986) (describing the "black letter view"). On separate occasions (and under different labels) Ronald Dworkin has pointed to a similar conception of law. *See* LAW'S EMPIRE, *supra* note 21, at 6-11 (identifying the "plain fact" view of law); A MATTER OF PRINCIPLE, *supra* note 21, at 11-30 (discussing the "rule-book" conception of law). In each case, he contrasts those conceptions with his own, putatively more sophisticated, vision of law that he has termed the rights conception, *see* A MATTER OF PRINCIPLE, *supra* note 21, at 11-12 and *passim*, and more recently "law as integrity," *see* LAW'S EMPIRE, *supra* note 21. I argue in Section V that Dworkin's alternative vision of law is best understood (whatever its current label) as a version of the Legal Process conception. *See infra* text accompanying notes 75-82.

In Dworkin's discussions of these variations of the Simple conception, he is chiefly concerned with the question, "What is the Law?" Although one consequence of each conception of the common law is to identify the relevant law of contracts to be explained, the focus of this article is different from the focus of Dworkin's writings. While he is concerned with the nature of law and the proper form of judicial decisions, *see infra* text accompanying note 76, this article focuses instead on the criteria for adequate theorizing about the common law's separate parts.

35. *See, e.g.,* A FARNSWORTH, CONTRACTS 105-210 (1982).

coercion, illegality, or fundamental mistake.<sup>36</sup> For contracts of certain specified types, a signed writing is required for the agreement to be enforceable.<sup>37</sup> The parties must perform their respective obligations, and there are rules of interpretation and construction that elaborate on the terms the parties have agreed upon if their meaning becomes controversial.<sup>38</sup> Other rules will provide terms or dictate an order of performance where the parties have failed to agree on all the contract's particulars.<sup>39</sup> Finally, there are rules that govern the remedies to be granted in the event that the parties fail to meet their obligations.<sup>40</sup> While there will be variations across jurisdictions, the standard sources converge on this basic picture.

Lawyers and judges also converge on fundamental questions of classification. Legal practice supposes that there are generally acknowledged boundaries between contract disputes and other legal controversies. In some cases the proper resolution of a dispute may depend on a question of classification, and judicial decisions sometimes include a holding that the controversy at hand is a question of contract law rather than tort, or vice versa.<sup>41</sup>

### B. *Fried's Reliance on the Simple Conception*

Several facets of Fried's argument indicate that he relies on this conception of contract law and that he holds his theory to be adequate because it justifies contract's traditional doctrinal structure in terms of our obligation to keep promises. First, there is Fried's own characterization of his enterprise. It is his avowed ambition to show that contract law has a unifying doctrinal structure and that this structure can be "referred" to moral principles.<sup>42</sup>

Second, there is the structure of his book's discussion. Successive chapters review many of the traditional rules and standard cases, justifying the various doctrines in terms of the promise principle. For example, he distinguishes true promises from mere vows, and contends that a true promise is binding because it has been accepted in some sense by the promisee.<sup>43</sup> This feature, he argues, warrants the

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36. *Id.* at 39-104 (consideration and substitute grounds for enforceability); 213-32 (status and capacity); 232-71 (fraud, duress, coercion, and misrepresentation); 293-368 (unconscionability, illegality, and public policy).

37. *Id.* at 369-441 (Statute of Frauds).

38. *Id.* at 445-534 (interpretation and gap-filling).

39. *Id.* at 535-645.

40. *Id.* at 811-914.

41. *See, e.g.,* *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331 (E.D. Pa. 1971) (plaintiffs are required to proceed on breach of contract, as opposed to tort, theory).

42. *See supra* text accompanying note 23.

43. C. FRIED, *supra* note 7, at 41-43.

constellation of rules that dictate that an offer must be accepted for an enforceable agreement to result.<sup>44</sup> To demonstrate the power of his distinction, Fried even pursues one of contract's notable white rabbits: he analyzes the Mailbox Rule, which holds that a mailed acceptance of a written offer is effective as soon as the acceptance is posted (unless the offeror has stipulated actual receipt),<sup>45</sup> arguing that its dictates are consistent with the promise principle.<sup>46</sup>

A third feature of Fried's argument which indicates his reliance on the Simple conception is his handling of the dominant theory of *consideration*. The common law has never imposed liability for a promise, without more. To be enforceable, a promise is commonly said to require consideration or one of its substitutes. The dominant explanation of consideration is the *bargain theory*: a promise is enforceable if it has been bargained for, and a promise is bargained for if it is given in exchange for a return promise or performance.<sup>47</sup> The most notable type of promise that may lack consideration is the promise to make a gift. At one point in contract's past, promises were generally unenforceable if they lacked consideration; gift promises, no

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44. *Id.* at 45-48.

45. *See, e.g.,* A. FARNSWORTH, *supra* note 35, at 161-71.

46. C. FRIED, *supra* note 7, at 50-52. Adducing instances of a scholar's reliance on the Simple conception is made complex by one salient feature of this conception. I argue in Section V that the Legal Process conception is importantly different from the Simple conception because the latter, but not the former, provides for evaluations of the existing state of the law. *See infra* text accompanying notes 79-80. Nonetheless, in some circumstances the two conceptions converge on the same picture of the law of contracts that should be explained by an adequate theory. The two conceptions will identify the same set of rules and doctrines to be explained if the traditional set is not only commonly acknowledged by the standard treatises and Restatements, but is *also* in accord with the principles and policies of law that underlie contract. It then follows that Fried's apparent reliance on the Simple conception to identify the rules that need accounting for could be construed instead as an elliptical form of reliance on the Legal Process conception: he seeks to explain the existing doctrines just because they are in accord with the promise principle as he articulates it.

Because of the logical possibility that under certain circumstances the two conceptions will converge, it is difficult to establish beyond all doubt the claim that any given theorist relies on the Simple as opposed to the Legal Process conception. Moreover, because I argue later that Fried also relies on the Legal Process conception of contract law, *see infra* text accompanying notes 83-90, I cannot rule out the possibility that Fried is, in fact, covertly relying on the Legal Process conception where I interpret him as relying on the Simple conception instead. Still, two features of Fried's argument confirm my claim that he relies not only on the Legal Process conception but on the Simple conception as well. One feature that confirms his use of the simple conception is his discussion of the doctrine of consideration. *See infra* note 53. Another is his easy acceptance of the "law of contract" as a given to be explained. *See supra* note 23. This indicates that he has adopted the Simple conception's identification of the relevant law to be explained, rather than attempting to rebuild in accordance with the promise principle only those rules of contract law that would be needed on some independent assessment of the law.

47. *See, e.g.,* A. FARNSWORTH, *supra* note 35, at 44-46; G. GILMORE, *supra* note 32, at 60-65, 69-70.

matter how sincerely made, were usually denied enforcement.<sup>48</sup> Modern developments, however, have anointed several surrogates, of which the most prominent are promissory estoppel (or detrimental reliance)<sup>49</sup> and, in some jurisdictions, "moral" consideration.<sup>50</sup> In the right circumstances, a gift promise may be enforceable on the strength of one of these bases even though it lacks classical consideration.<sup>51</sup>

If, on the Simple conception, an adequate theory must explain the standard doctrinal structure, then Fried should justify in terms of the promise principle the distinctions that contract draws between enforceable and unenforceable promises. Fried prefers to finesse this question. He reviews the bargain theory and pronounces it incoherent. Accordingly, he finds no intellectual obligation to justify it or the distinctions it would make. This stratagem means that Fried has not explained all the traditional structure, and he acknowledges this failing. In summarizing his discussion of consideration he says: "I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. . . . My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts."<sup>52</sup>

Although his treatment of consideration deviates from the strictures of the Simple conception, his argument on this point confirms his reliance on that conception, for he takes pains to defend his departure. The bargain theory is incoherent and it therefore poses no real objection to the promise theory. Fried's argument implies that a coherent part of contract law which could not be squared with the promise principle should count against his view, and he feels an intellectual obligation to square his theory with the details of settled law.<sup>53</sup>

### C. *Assessing the Simple Conception*

The Simple conception of law is not without its homey virtues.

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48. See, e.g., A. FARNSWORTH, *supra* note 35, at 46-48.

49. See *id.* at 89-98.

50. *Id.* at 52-59.

51. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 86 (moral consideration), 90 (promissory estoppel) (1979).

52. C. FRIED, *supra* note 7, at 37-38.

53. This point indicates Fried's reliance on the Simple conception, as opposed to some elliptical reliance on the Legal Process conception. See *supra* note 46. For, were he to rely, convertly, on the Legal Process conception, the relevant question would not be whether he could dismiss the traditional requirement of consideration but whether he could identify aspects of it that are in accord with the principles and policies that underlie contract law. Or, failing to establish a connection between the promise principle and the consideration requirement for *that* reason, as Fried does in other cases. See *infra* text accompanying notes 71-72.

At the very least, it provides lawyers and judges with an easily ascertained point of departure for their arguments. Further, if the law could be cast into a comprehensive and stable structure of doctrines and cases, then private parties would find it easier to conform their activities to the dictates of law and evaluate their potential liabilities. Finally, the Simple conception commends itself as a corrective to an overactive judiciary. At least if the Simple conception is understood to preclude judge-made changes in the law, then reliance on this conception may prevent judicial originality or creativity.<sup>54</sup>

By itself the Simple conception provides only a partial answer to the question, "What is the law of contracts?" The standard structure provides the theorist with a set of rules and cases to be explained, but it provides no criteria for evaluating new developments in contract law. We expect, however, that contract law will change in at least some respects over time. Judges will make new applications of existing rules, extend established rules to new kinds of controversies, and sometimes formulate altogether new rules. Unless contract law were to become stagnant, a theorist needs criteria by which to assess its developments. Are these new doctrines part of contract law properly so called? Or, are they better understood as belonging elsewhere in the common law? Because the Simple conception simply refers to the doctrinal structure which is represented in the standard sources, it fails the theorist in this crucial respect. The theorist must either derive the needed criteria from some other source or else abandon the Simple conception in favor of some alternative.

The emergence of promissory estoppel is an example of the kind of development that throws our classifications into question. For some time courts tended to deny enforcement if a promise was not supported by consideration, even when the promisee had relied on the promise.<sup>55</sup> Thus, a promise to give my granddaughter a sum of money would lack consideration if my promise was not induced by a return promise or performance on her part. Promissory estoppel makes my promise enforceable if I knew (or had reason to know) that she would rely on the promise to her detriment, and she did in fact so rely.<sup>56</sup> Promissory estoppel now affects more issues than just the promise to make a gift. In some cases, for example, an unaccepted offer has been held to give rise to liability, where the offeree has relied

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54. See, e.g., *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 49-55, 141 A.2d 276, 288-91 (1958) (Heher, J., dissenting); *Riemann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 139, 87 A.2d 325, 327 (1952).

55. See, e.g., *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

56. The example is drawn from *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898) (grandfather's promise enforced against his estate because of "equitable" estoppel).



to his detriment before his acceptance was effective.<sup>57</sup>

How should a theorist treat promissory estoppel? Early courts seemed nervous about enforcing promises for which, under the traditional definition, there was no consideration. Some judges resorted to subterfuge: they stretched the consideration definition in order to hold the particular promisor liable, while avoiding, at least on the surface, the appearance of significant change.<sup>58</sup> Others favored indirection, styling enforcement of the promise as a dictate of equity rather than of law.<sup>59</sup> At some point, judges and commentators came to accept promissory estoppel as a legitimate addition to contract—recognizing, perhaps, that its effect is to enforce promises that were freely given. But there are clouds on the current horizon that may foreshadow a future shift away from its present acceptance as part of contract.<sup>60</sup>

One cannot determine from the Simple conception alone whether an adequate theory of contract law should account for promises that are enforced on the grounds of detrimental reliance. Because the Simple conception simply assumes the standard structure of cases and doctrines, it provides no substantive criteria for proper classification of novel legal actions. In general, it appears that the Simple conception would suffice *only* if distinguishing contract issues from other aspects of the common law were an unproblematic task. But, it can be seen that discriminating among the various facets of the common law is more complicated and controversial than might at first appear.

To decide a case, judges frequently need to classify the dispute or some salient aspect of it. Is this an action for breach of contract, or for tort? Did the offeree's response to the offer constitute a valid acceptance, or a counter-offer? Legal controversies, however, do not wear their proper labels on their sleeves. There are two aspects of the judicial decision process that imply that the proper classification of a case will be a matter of ongoing controversy.

First, how a judge characterizes a controversy can sometimes be the end result of judicial reflection on the nature of the dispute rather than the beginning point. Frequently, the ultimate disposition of a case will turn on the judge's classification. Given the facts of a particular dispute and the existing state of doctrine, it may well be that the action is effectively resolved if the court holds that the dispute is one

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57. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

58. For an extended argument that the New York Court of Appeals was attempting this sort of stretching during Cardozo's tenure, see G. GILMORE, *supra* note 32, at 62-63.

59. See, e.g., *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

60. See *infra* text accompanying notes 149-55.

of contract and not, say, of tort, instead. So, if liability attaches only upon the promisor's being held to have made a contract, and if the court feels compelled, for whatever reason, to hold the promisor liable, then there will be an impetus towards holding that the promisor made a contract. By the same token, if a contract can be found only if one party is held to have made a promise to another, then there may be an impetus towards concluding that a promise was made.<sup>61</sup> The judge's classification of a controversy might not be the first step of his reflection about how to resolve the dispute; it may instead follow from those reflections. As a result, the judicial decision process may well lead to the imposition of contractual liability where previously no contract would have been found.

Second, on any tenable conception of the common law, judicial decisions comprise an important part of that law. Because the common law of contracts is at least in part precedential, what a judge now characterizes as a contract dispute will depend on how judges in the past have distinguished contracts from other legal relations. Even if past courts have, by some standard or other, been "wrong" in their classification—that is, have counted some disputes as contract matters that, by some theorist's lights, should have been relegated to torts instead—those past errors might now be embedded in the law of contracts in virtue of other judges having followed those "wrong" decisions.<sup>62</sup> Thus, contract law's current set of classifications may not resemble the discriminations that were drawn at some point in the common law's past and might not, moreover, reflect the classifications that appeal to laymen. Contract's language and important terms may frequently be matters of art.

These two factors combine. Thus, result-oriented judges may find contractual liability in cases where prior cases did not, and the generally precedential nature of the common law means that those willful decisions, once reached, guide later judges in their deliberations. Contract law may therefore change across time, and theorists, even those relying on the Simple conception, will ultimately need a basis for discriminating among the new developments.

#### D. *Problems with Fried's Reliance on the Simple Conception*

Fried's use of the Simple conception of law demonstrates both its

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61. See also *infra* text accompanying notes 63-69.

62. "The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten." *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 373, 159 N.E. 173, 174 (1927) (Cardozo, J.).

usefulness and its failings. Judges and practitioners rely on the standard structure of cases and doctrines as the point of departure for their arguments, and Fried begins his argument with agreed-upon doctrines and well-established cases. But, while judges and practitioners might work to modify (or defend) particular parts of contract law, they can content themselves with the general structure. Fried's theoretical ambitions require him to go further. He claims to justify all of contract law, and his arguments must be similarly sweeping in their scope of application. It can be seen, however, that his effort at justification is undermined by problems of the Simple conception. First, the judicial willfulness noted above vitiates his argument that contract law is based on the moral obligation to keep one's promises. It is a consequence of this willfulness that the "promises" now recognized by contract law differ from the promises for which Fried can claim a moral obligation. Second, various contract doctrines that Fried himself regards as inconsistent with the promise principle refute his claim that contract law can be explained by reference to promise-keeping's important features. Because the Simple conception does not provide any criteria for modifying the standard structure, Fried cannot, consistently with the Simple conception, ignore the deviant "promises" that are recognized by the law, nor can he reject those doctrines that are intractable for the promise principle.

An act that is characterized as a promise by contract law is not necessarily a promise from the point of view of morality. For Fried, a promise is an act that voluntarily invites another person to rely on the promisor's stated plans and intentions. "An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance."<sup>63</sup> But, as was argued above, an inclination to provide a contractual remedy can lead the court to characterize the parties' relationship as contractual. And if a contract is deemed to involve a promise or set of promises, as the Restatement indicates, then the inclination to provide a contractual remedy can also lead a judge to characterize one party's remarks as amounting to a promise. The fact that a court styles those avowals as promissory does not mean that the party who is held liable invoked, in any meaningful sense, the convention of promising.

In short, a significant selection of avowals that are enforced by the law of contracts are not promises as we would standardly recognize them in moral theory. This fact is demonstrated most powerfully by the curious phenomenon of *implied at law* promises. These

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63. C. FRIED, *supra* note 7, at 16.

promises are one of two kinds of "implied" promises recognized by contract law.<sup>64</sup> The other kind are *implied in fact*, which are really promises, but not explicit. "Implied at law" is usually better understood to mean "imposed by law." That is, the putative "promisor" is held liable as if he had promised, whether or not he actually did so. Sometimes it is said that the bound party is "deemed" to have made a promise, but on such occasions it is clear that the deeming is of the law, and not of the facts of the situation. Implied at law promises are usually not promises at all, except in the consequences imposed on the promisor.

Implied at law promises are useful devices for courts that seek to readjust the respective rights of particular types of parties, especially in transactions that threaten a recurring kind of unfairness.<sup>65</sup> For example, if I make you an offer you might, before actually accepting my offer, begin either the performance that I ask for or, instead, preparation for that performance. Standard contract law holds that the offeror is master of his offer and that I may therefore withdraw my offer without liability at any time before you accept it.<sup>66</sup> If I withdraw the offer after you have begun preparation or performance but before you have accepted, then you will be out of pocket to the extent that you had expended time or money on the prospective contract, no matter how reasonable your actions. In short, the offer that has been relied on but not yet accepted can pose a risk of unfairness to the offeree. One way for a court to alleviate that unfairness is to posit an implied promise. If you had begun performance or preparation, I might be deemed to have made an "implied subsidiary promise" not to withdraw my offer until you had had a reasonable time in which to accept it. By deeming me to have made such an implied promise, the court could hold me liable as if I had so promised, even though I never did any such thing.<sup>67</sup>

Perceived unfairness is frequently an engine for change in contract law, and implying a promise in the situation of the relied-on offer is only one instance of a long history of promises implied by a court to prevent such unfairness. While this type of judicial intervention might not pose any great theoretical concern if we could always distinguish the implied at law promise from other implied promises, courts are frequently not so forthcoming as to acknowledge that the

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64. See, e.g., 1 CORBIN ON CONTRACTS §§ 38-39, 44-50 (1963).

65. Implied at law promises have played a role throughout contract's history. See, e.g., J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 282-87, 293-98 (1979).

66. See, e.g., A. FARNSWORTH, *supra* note 35, at 148.

67. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413-14, 333 P.2d 757, 759-60 (1958).

"implication" in a particular case is legal rather than factual. Moreover, there are instances where courts have either overlooked or deliberately fudged the difference between the two kinds of implication.<sup>68</sup> Finally, the precedential nature of the common law means that in future cases, a past lack of judicial precision (or lack of candor) could engender contract liability on the strength of a nonpromise,<sup>69</sup> without acknowledging the gap between ordinary language and contract's terms of art. In short, what contract law now labels a promise, may well not be a promise at all.

What bedevils Fried's account is that the Simple conception of contract law provides no criteria for assessing whether some novel judicial decision is consistent with the standard set of doctrines and cases. Lacking such criteria, Fried cannot claim that some particular holding is wrong as a matter of *law* just because it is at variance with the promise principle. For example, recent cases have employed the doctrine of unconscionability to void agreements that, in the courts' eyes, are grossly unfair or oppressive.<sup>70</sup> For Fried, some of these decisions are wrong. If a promise was freely made then it should be enforced,<sup>71</sup> social or economic inequalities notwithstanding. Correcting those inequalities is the obligation of society in general, he argues, and not properly the burden of the party who benefits from those inequalities in his agreements.

In other places, Fried proposes the wholesale abandonment of established doctrines. In their agreement the parties may fail to anticipate every possible occurrence that might bear on their contract, and contract law has equipped itself with doctrines that regulate agreements that events unprovided for have undermined in some way. The "gap-filling" doctrines of mistake, frustration of purpose, and impossibility (or impracticability) allow in the proper case one party to escape his contractual obligations.<sup>72</sup> The unanticipated event means that one party will suffer a loss—either the party who is forced to perform (even though performance must be rendered in a world significantly different from that contemplated at the time of the agreement) or else the other party who, if the first party is excused, is

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68. See, e.g., *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 377, 159 N.E. 173, 179 (1927) (Cardozo held the promisor liable for the promise of a gift to the college on the strength of the college's subjecting "itself to . . . a duty at the implied request of the promisor." What Cardozo does not pursue is that the request looks significantly more implied at law than in fact.).

69. Jules Coleman interprets the development of promissory estoppel in this way. See J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 191-92 (1984).

70. See, e.g., A. FARNSWORTH, *supra* note 35, at 307-19.

71. C. FRIED, *supra* note 7, at 104-09.

72. See, e.g., A. FARNSWORTH, *supra* note 35, at 647-705.

deprived of the promised performance. These gap-filling doctrines generally place a burden of proof on the party who seeks to escape his obligations: he must show that the circumstances warrant his being excused.<sup>73</sup>

On Fried's view these doctrines are wrong-headed. When the parties' fundamental assumptions turn out to be mistaken, then no contract was ever formed. To revert to the old metaphor, their minds did not meet. Because there is no contract, it is wrong to hold either party to the purported agreement. Traditional doctrine goes awry, he suggests, because it supposes that one party or the other must bear the loss.<sup>74</sup> The question, "Who should bear the loss?" ought to be distinct from the question, "Is there a contract?" If there is a contract, then the agreement imposes the loss on the party who agreed to bear it. But, when the agreement was never made it is fairer and more sensible, he argues, to require the parties to split the loss, relying on equitable principles rather than the promise principle to allocate the loss to be borne.

When Fried rejects the current use of unconscionability and the existing doctrines of mistake, frustration, and impossibility, he is rejecting the traditional doctrinal structure as inadequate and, on these particular questions, proposing his own analysis in its stead. When he eschews the bargain theory of consideration his position is, at least in part, justifiable on general grounds of theory construction and acceptability. No theory, he might well argue, should be required to justify an incoherent doctrine. But his rejection of unconscionability's excesses and gap-filling's wrong-headedness is different. He rejects these facets of the traditional doctrinal structure because they do not conform to the moral principles he espouses. Thus, at least on these questions he finds the Simple conception of contract law unsatisfactory; he requires instead some further grounds for choosing the legal phenomena that his theory might explain. He cannot advance his theory by relying on the Simple conception alone, because that conception provides no basis for evaluating legal developments that he disfavors.

## V. CONTRACT LAW AS PRINCIPLES AND POLICIES

### A. *The Legal Process Conception of Law*

A more complex conception of contract law would include the principles and policies (sometimes denoted collectively as "stan-

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73. *Id.*

74. C. FRIED, *supra* note 7, at 64-67.

dards")<sup>75</sup> that might be employed by judges to modify a rule of contract law or extend it into new circumstances, to resolve a conflict among authorities, or to justify the creation of new law. On this conception, an adequate theory of contract law would agree *for the most part* with the rules that comprise contract's commonly relied on doctrinal structure and explain *most* of the standard cases. The impetus to include principles and policies as important parts of contract law stems from the recognition that the traditional structure might need revision and that its various authorities might be in tension and need reconciliation. So, on this conception of law, it is unlikely that an adequate theory would explain all of the standard cases or agree entirely with the received doctrinal structure. Rather, it would explain some mix of cases and rules, together with the principles and policies that regulate or justify the cases and rules.

Ronald Dworkin made the philosophical community sensitive to this conception of law when he argued, in challenging H.L.A. Hart's version of legal positivism, that decisional law includes principles and policies as well as cases and rules.<sup>76</sup> In legal scholarship, this conception is often associated with the views of Henry Hart and Albert Sacks, as revealed in their unpublished manuscript, *The Legal Process*.<sup>77</sup> Although the discussion that follows may deviate in various ways from Hart and Sacks' picture, I will call this the Legal Process conception in recognition of their contributions.<sup>78</sup>

Legal practice reflects this conception in various ways. Advocates will base their arguments on claims of principle and policy, and judges will refer to various standards as warrants for their decisions.<sup>79</sup> What is perhaps most important is that including principles and policies gives us a more elegant and powerful conception of law. The Simple conception was deficient, it was argued above, in that it provides no criteria for assessing changes in the law.<sup>80</sup> The Legal Process conception cures that deficiency: warranted developments in contract law will further the principles or policies that lie behind the past deci-

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75. See R. DWORKIN, *supra* note 1, at 22.

76. *Id.*

77. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

78. I have argued elsewhere that Dworkin's writings about the nature of law and the proper role of the judge should be read as expounding the same basic views as Hart and Sacks articulated in their manuscript. See Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. — (1987).

79. See, e.g., *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889) (referring to standard that one should not profit from one's own wrongdoing).

80. See *supra* text accompanying notes 54-62.

sions.<sup>81</sup> Moreover, the Simple conception provides no criteria for determining the scope of contractual liability.<sup>82</sup> Including principles and policies in our conception of the law can aid that determination: if some development conforms to the principles and policies that rationalize contract decisions, then the conformity gives grounds for counting that development as part of contract law. Indeed, the Legal Process conception even provides a basis for discerning contractual liability where the lawyers and judges have styled the legal issue otherwise; principles and policies may be more reliable than the labels used by the participants.

### B. *Fried's Reliance on the Legal Process Conception*

Fried does not acknowledge his reliance on this conception of law. Nevertheless, it is patent that his argument incorporates its features, for his very references to the promise *principle* confirms his use of this conception. Fried does not argue that judges have explicitly invoked the obligation to keep promises to support their holdings in contract cases, nor that contract rules are, generally, expressed in terms of the promise principle. Rather, he hopes to explain contract's structure and evaluate its developments in terms of the principle.

Fried's treatment of promissory estoppel exemplifies his reliance on the Legal Process conception. Promissory estoppel's inclusion in contract law has been controversial, as noted above,<sup>83</sup> and remains problematic for the theorist.<sup>84</sup> Fried uses the promise principle to evaluate the legitimacy of estoppel's various facets. As Fried has articulated the principle, every promise properly so called is potentially binding because the promisor has given moral grounds for acting on the promise. This includes promises to make a gift, which traditionally were unenforceable because of the doctrine of consideration. Fried rejects the doctrine of consideration, and with it the need to distinguish some promises from others on the strength of the promisee's detrimental reliance. If there was a promise made, then it deserves enforcement.<sup>85</sup> Promissory estoppel, in its traditional application to gift promises, is rendered otiose by his argument.

But promissory estoppel has now been applied beyond the context of gift promises. It has been employed, for example, to make the offeror liable when the promisee has relied on, but not accepted, the

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81. See, e.g., *MacPherson v. Buick Motors*, 217 N.Y. 382, 111 N.E. 1050 (1916) (revising tort standard for liability for inherently dangerous objects).

82. See *supra* text accompanying notes 54-62.

83. *Id.*

84. See *supra* text accompanying notes 57-60.

85. C. FRIED, *supra* note 7, at 37.



offer.<sup>86</sup> On Fried's analysis the moral force of promising binds us only to those acts that are promises properly so called, and that means that they must have been accepted.<sup>87</sup> The unaccepted offer, although a promise in form, should not create contractual liability for the offeror, notwithstanding the offeree's reliance.<sup>88</sup> The cases that have invoked promissory estoppel to make a party liable for the relied-on offer are wrong, on Fried's view, because they run counter to the promise principle. If the offeror acts wrongfully in withdrawing his offer his actions may create tort liability, but the offer should not be made enforceable as a contract merely because of the offeree's reliance.<sup>89</sup>

Finally, one sub-theme of *Contract as Promise* is Fried's attempt to rebut recent contentions that contract law relies essentially on other principles besides the promise principle. The literature on this question has advanced two other candidates as the basis of contract law: the *reliance* and the *benefit* (or *restitution*) principles.<sup>90</sup> At different places and in various contexts, Fried argues that the promise principle provides a superior account of contract law than either of these rivals. What confirms Fried's reliance on the Legal Process conception is the nature of his rebuttal. He does not challenge the coherence of attempting a theory of contract law predicated on principles and policies; indeed, he does not even discuss the use of principles or policies as an interesting theoretical move. He recognizes in these rival theories the Legal Process conception at work, and finds it tolerable, although he maintains that the account provided by either the reliance or benefit principles is inadequate.

### C. *Assessing the Legal Process Conception*

Including principles and policies in our conception of the law of contracts can provide a more powerful and elegant theory of contract law. Inasmuch as the promise principle is, on this conception, a part of contract law, Fried can justify his rejection of doctrines and appli-

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86. See *supra* note 57 and accompanying text.

87. See *supra* text accompanying notes 41-44. It is important to note in this regard that what counts as an acceptance for Fried, suitable to distinguish the viable promise from the unenforceable vow, is not the same as the reciprocal binding obligation necessary for consideration. Therefore, some of the cases where the offeree has used and relied on the offer would count for Fried as accepted promises and hence enforceable. See C. FRIED, *supra* note 7, at 54-56; see also *Drennan v. Star Paving*, 51 Cal.2d 409, 333 P.2d 757 (1958). But see *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933) (offer not accepted, although used by offeree).

88. C. FRIED, *supra* note 7, at 54-56.

89. *Id.*

90. See Fuller & Perdue, *The Reliance Interest in Contract Damages I*, 46 YALE L.J. 52, 53-57 (1936).

cations that are not consistent with the promise principle. In these respects, at least, the Legal Process conception seems to offer substantial advantages over the Simple conception. In other respects, however, we may question how satisfactory the Legal Process conception really is. Its power and elegance derive from facets of the conception that are either controversial and in need of further support, or else incomplete and requiring further development. If the needed support and refinement cannot be provided, the Legal Process cannot command acceptance.

One problem for the Legal Process conception is that of legitimacy. A judge may justify decisions that extend or change common law rules by reference to the principles or policies of the law. But what is it about principles and policies that warrants a judicial decision? The common law is fundamentally precedential in nature: a judge's decision in the case at hand should derive from his general obligation to decide like cases alike together with the past decisions in similar cases. Why should a court feel bound to adhere to some standard? What precedential authority do principles and policies have?

While the Legal Process conception has been influential in legal scholarship for the past thirty years,<sup>91</sup> few legal theorists have examined the legitimacy of principles and policies in our system of law. Hart and Sacks posit the existence of these standards "underlying" legal rules.<sup>92</sup> The most elaborate attempt to integrate legal standards into our conception of law is that which Ronald Dworkin proposed. Dworkin initially argued, against H.L.A. Hart, that principles and policies are important constituents of law.<sup>93</sup> His later writings suggest that only principles are legitimate bases for judicial decisions that change the common law in any way.<sup>94</sup> On Dworkin's view, principles derive their legitimacy from their place in the best available constitutional theory that justifies the legal system as a whole.<sup>95</sup> Principles (and possibly policies) are therefore authoritative to the extent that they help generate a coherent explanation for precedent in the law. Put differently, courts cannot coherently treat like cases alike without adequate criteria for likeness; principles and poli-

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91. See, e.g., Vetter, *Post-War Scholarship on Judicial Decisionmaking*, 23 J. LEGAL EDUC. 413 (1984); see also G. CALABRESI, *THE COMMON LAW FUNCTION IN THE AGE OF STATUTES* (1982) (acknowledging Hart and Sacks' influence); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) (acknowledging influence of Hart and Sacks).

92. See H. HART & A. SACKS, *supra* note 77, at 161-62.

93. See R. DWORKIN, *supra* note 1, at 22-45.

94. See *id.* at 81-130. But cf. Wellington, *supra* note 91 (disagreeing with Dworkin on the strength of a different notion of the nature and role of legal principles).

95. R. DWORKIN, *supra* note 1, at 81-130.

cies comprise part of the structure of the law that identifies relevant similarities among cases.

The controversy about the legitimacy of standards within a system of precedent parallels in many respects a problem concerning the precedential value of legal rules. After all, when judges announce a legal rule binding on similar cases yet to be decided, that pronouncement is not obviously part of their *holding* for the case at hand. On some views of the matter, at least, the strict dictates of *stare decisis* deny to the pronouncement of a rule the very authority that it purports to have.<sup>96</sup> Nonetheless, it is clear that subsequent courts (and the practicing bar) accord substantial weight to the announced rule. It is plausible therefore that the rule's authority derives from its coherence as an explanation of the total pattern of decisions. Dworkin's answer to the problem of a standard's legitimacy is thus appealing, for it puts standards on the same footing as legal rules.

But, Dworkin's resolution of the problem of legitimacy highlights another difficulty that attends the Legal Process conception: given that principles and policies are, in some sense, warrants for legal decisions, *which* legal decisions do they authorize? That is, if legal standards are legitimate because they help explain past decisions, how can the judge discern the content of those standards so as to arrive at the correct decision in the case at hand? On any version of the Legal Process conception, standards are abstract and general. It is uncertain how they could dictate any particular result in a given case. Moreover, in Dworkin's view, a standard's validity derives from its inclusion in the best theory that explains settled law. No particular announcement of a standard is binding; no court's statement of a standard's scope or proper application is conclusive. It follows that it is always open to reexamination just which principles and policies comprise the law of a given common law topic. Finally, there is no guarantee that legal standards are necessarily compatible in every case. In any particular controversy, for example, the principle that we should keep our promises may well conflict with the policy against substantial forfeitures, or with the policy against economic waste. How should the court weigh the various legal standards against one another?

One problem of the Legal Process conception bears particularly on the task of developing a theory for some part of the common law. Are there standards (or is there some set of standards) specific to *particular* areas of the common law—standards, for example, which can help the theorist discriminate contract law from the rest? Fried sup-

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96. See, e.g., E. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-3 (1948).

poses that the promise principle is peculiar to contract law and marks off contract from the rest of the law of obligations. But the history of contract's development shows that promise-keeping was efficacious in tort law as well,<sup>97</sup> and that other principles besides promise-keeping have shaped contract law.<sup>98</sup> If the theorist is to differentiate contract law from, say, tort by relying on a conception of law that includes legal standards, then the standards themselves must provide the necessary distinction. But, the principles that seem efficacious in contract decisions do not seem to serve the theorist in that fashion.

It is perhaps significant in this regard, that even Professor Dworkin has not attempted to mark off the various subspecialties of the common law in terms of the applicable principles. At most, he ventures to remark on the principles that might bear on a particular case.<sup>99</sup> Indeed, it is consistent with Dworkin's version of the Legal Process conception, and suggested by it, that the boundaries among the various parts of the common law are themselves open to revision. For, as the common law changes, it may develop that the best theory to justify the legal system as a whole will obviate the traditional distinctions between tort and contract, or, for that matter, between tort and property.<sup>100</sup>

#### D. *Problems with Fried's Reliance on the Legal Process Conception*

Fried's use of the promise principle can remedy some of the defects of the Simple conception that bedevil his account of contract law. Perhaps the promise principle can help us distinguish issues of contract law from other common law concerns or aid us in evaluating controversial new developments. By relying on the the Legal Process conception, however, Fried raises further questions about his theory's adequacy—questions about the various legal standards that, on the Legal Process conception, inform contract law. For, the promise principle is only one of several standards that have figured in contract law. Unless Fried can explain in terms of the promise principle the holdings and rules that have relied on other principles and policies, it is hard to conclude that Fried's theory is superior to its rivals.

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97. See J. BAKER, *supra* note 65, at 273-79, 329-30, 337-40.

98. See, e.g., Farnsworth, *The Past of Promise: An Historical Introduction to Contracts*, 69 COLUM. L. REV. 576, 594-99 (1969) (acknowledging the historical force of reliance and restitutionary principles).

99. See, e.g., R. DWORKIN, *supra* note 1, 22-28, 83-84, 118-19.

100. See Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

## 1. PROMISING AND POLICY

As Fried conceives it, the promise principle is fundamentally individualistic.<sup>101</sup> A contract is the promisor's own doing, and in making his agreement he brings liability on himself. Fried decries what he regards as an overexpansive use of unconscionability on the grounds that recent contract cases have voided agreements not because of some defect in the agreement, but rather, in order to achieve some redistribution of wealth. Whatever the merits of this position, it belies the extent to which substantive rules of contract law have always been a tool for wealth redistribution, in particular, and social control, more generally.

Frequently, such control has been obscured because it has been achieved by technical devices. A brief review of the doctrines relating to conditions and performance can demonstrate both the social control and also the obscurity in which courts have exercised such control. A contract between *A* and *B* may call for each to render some performance to the other. The agreement may also specify certain *conditions*—events not certain to occur—on which their respective obligations are contingent. If *A*'s duty is unconditional then he must perform no matter what, and failure is a breach entitling *B* to damages. If *A*'s obligation is conditional, however, his performance obligation comes due and his nonperformance is actionable only if the contingency is fulfilled or excused.

As one example of judicially exercised control over contracting, consider the doctrine of *substantial performance*: a judicially created rule that concerns situations where the breaching party has fulfilled the lion's share of his contractual responsibilities.<sup>102</sup> It is within the parties' appropriate powers to condition each other's obligations on some event, as they may choose. In addition, courts will commonly construe one party's performance as a condition of the other's obligation to perform. These judicial additions to the agreed-upon terms are called *constructive* (or sometimes, *implied*) conditions.<sup>103</sup> For example, if Smith hires Jones to paint his house and they have specified nothing as to the order of their respective performances, the court will likely deem Jones's performance as a constructive condition of Smith's obligation to pay. Although the parties have not framed their contract in anything like these terms, it likely will be held that Smith's obligation to pay does not become due unless and until Jones per-

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101. See, e.g., C. FRIED, *supra* note 7, at 12.

102. See, e.g., A. FARNSWORTH, *supra* note 35, at 590-96.

103. *Id.* at 539 & n.13.

forms; Jones's failure to perform means that Smith is not yet obligated to pay.

But, suppose Jones's nonperformance is by most measures insignificant. Suppose, for example, that he has used a different brand of paint than what the contract specified, although of the same quality. He has not complied, that is, with the strict details of the contract but has tendered the great measure of the contracted-for performance.<sup>104</sup> If Jones's full performance is a condition for Smith's obligation to pay, then from Jones's failure it should follow that Smith's obligation does not come due and, further, that Smith's failure to pay is not an actionable breach. In short, conjoining the judicial construction of the order of performance with one party's failure to tender performance perfectly puts the other in a marvelous position: Smith would not owe Jones a farthing on the contract even though he had the substantial benefit for which he agreed to pay.

It seems that courts developed the doctrine of substantial performance at least in part to ameliorate the harshness of this conclusion, which resulted, after all, from the courts' imposition of a condition about the order of performance. Where one performance is the constructive condition of the other party's performance obligation, the doctrine of substantial performance requires the nonbreaching party to complete his own performance, the breach notwithstanding, and to seek damages for the promise-breaker's failure to live up to all his obligations.<sup>105</sup> In effect, the doctrine works to make Jones's substantial but not necessarily perfect performance a condition of Smith's obligation to pay. Just when the breaching party's performance is substantial (requiring the victim to perform) and when the breach is material (freeing the victim from performance obligations) remains an issue for legal determination. There is no simple test; no set of determinative factors.<sup>106</sup>

The substantial performance doctrine is only one of the doctrines relating to performance and conditions. What is significant with regard to Fried's thesis is this: these are constructive conditions.<sup>107</sup> They create terms of the contract to which the parties have not agreed. They result from judicially imposed rules determining which

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104. The hypothetical is derived from the facts of *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

105. *Id.*

106. See, e.g., *RESTATEMENT OF CONTRACTS* § 317 (1932) (tests for materiality).

107. Fried discusses both conditions and the particular topic of substantial performance. See C. FRIED, *supra* note 7, at 112-32. But his analysis does not acknowledge the status of some conditions as constructive. Instead, he attempts to reconstruct their role in contract law as the result of a complex interplay of the promissory and the restitutionary principle.

party has what performance obligations and seem to be imposed for reasons of social control. In some situations, they prevent unjust forfeitures, depending on the courts' perceptions of justice in the parties' respective positions.<sup>108</sup> In other cases they serve as a protection for certain kinds of parties,<sup>109</sup> and thus provide an incentive for certain activities. They serve, generally speaking, to readjust the risks and burdens that the parties must bear in the event that the contract cannot be fully performed. Because the parties' risks determine their bargaining positions, these rules can serve to shift economic positions and ultimately wealth.<sup>110</sup>

A brief review of the history of constructive conditions shows that courts have frequently used these doctrines in ways that would serve plainly redistributive goals.<sup>111</sup> In the nineteenth century, for example, courts characteristically deemed employment contracts as "entire": if the employee had contracted to work for, say, a year, then any performance short of a full year was a breach, and the employee could not recover for wages for the part of the year he had completed. Complete performance was a condition for any obligation on the employer to pay wages.<sup>112</sup> Ultimately, legislative correction was required to protect the worker. For building contracts, on the other hand, the doctrine of substantial performance protected the builder against any forfeiture, and even if he had failed to perform substantially, the contractor could recover for restitution of the value he had given to the buyer by part performance.<sup>113</sup>

Observing how courts have tailored rules like substantial performance to different kinds of contracts makes it plain that judges have long felt free to shape doctrine in order to promote social policies. It is hard to view such discrepant judicial treatment without attributing economic or political rationales to the decisions. In short, there are policies that courts have recognized as important in contract law and that judges have used to justify their decisions. But, these policies run counter to the promise principle, at least as Fried understands and expounds it.

## 2. ONE PRINCIPLE AMONG OTHERS

Two other principles could be said to compete with the promise

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108. See, e.g., *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

109. For an early analysis of this function of constructive conditions, see Patterson, *Constructive Conditions in Contract*, 42 COLUM. L. REV. 903, 919-20 (1942).

110. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472-75 (1980).

111. See, M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 186-88 (1977).

112. *Id.* at 186.

113. *Id.* at 187.

principle for explanatory force in contract law. One of these is the reliance principle: when *A* justifiably relies to his detriment on the actions or statements of *B*, then *A* can in a proper case recover from *B* to the extent of his reliance on *B*'s actions or statements. The reliance principle lies at the heart of the development of promissory estoppel. Another principle is that of benefit, or restitution. Suppose Smith delivers to Jones's house coal that was supposed to be delivered to Jones's neighbor's house instead. If Jones uses the coal, then Smith can recover from Jones the value of the benefit Jones unjustifiably obtained. In legal parlance, Jones will be forced to disgorge the extent of his enrichment, restoring it (or its value) to Smith. Some recoveries that are justified by reference to the principle of restitution are styled quasi-contract.<sup>114</sup> Restitution and reliance have long and venerable pedigrees in the common law. We can point to their importance in early common law mechanisms for handling problems of promissory liability.

The issue remains in some doubt, but contract as we now understand it seems to be a relatively new enterprise within the history of the common law.<sup>115</sup> Our modern form of contract seems to have emerged from the writ of *assumpsit*—that is, from a branch of the common law that, looking backwards from our current viewpoint, we would style tort. In the writ system of the common law, an action of *assumpsit* would lie for one's failure to do as one should when one had assumed a special obligation. One might assume such an obligation by making a promise, but one might also assume the obligation in virtue of one's profession or "calling." In short, while *assumpsit* included something of our modern promissory liability, it was fundamentally delictual in nature. In *assumpsit*'s earlier incarnations one was liable if one had promised to do something and then harmed the promisee by a negligent performance. To move from liability for misfeasance to a more recognizable form of liability just because one had promised and then failed to carry out one's promise required several generations of sly lawyering.

In the system of writs, what had preceded contract was not one but two actions—*debt* and *covenant*. To gloss over many of the subtleties, the action of debt seems to have been primarily proprietary in nature.<sup>116</sup> As it developed, I could sue in debt to recover a specified amount of money but not for generalized damages. To sustain my

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114. See A. FARNSWORTH, *supra* note 35, at 98-100.

115. For a concise and readable summary of the historical progression from the various writs to a unified law of contracts in England, see J. BAKER, *supra* note 65, at 273-90.

116. *Id.* at 266-71.



suit I could allege that I had given a *quid pro quo*—I gave you something of value, which entitled me to the sum of money that you had undertaken to pay. You are no longer entitled to that sum, for a right to it passed to me when you accepted the *quid pro quo* that I gave you. So, I may properly demand that you give back to me that which I now (in virtue of our transaction) own. Conversely, if you do not tender the money, I am warranted in recovering the specific goods that I gave to you by way of a *quid pro quo*. Covenant, on the other hand, was in many superficial respects much more like contract.<sup>117</sup> It was an action to enforce a promise, although the action was limited to promises that had certain attributes. If you had put your promise in writing and then sealed the writing, I could sue to enforce the sealed promise. Characteristically, I could not enforce the promise unless it was sealed.

This history suggests that the reliance and restitutionary principles should be accorded at least as important a place in contract's pantheon as should the promise principle. Promise-keeping was recognized, but not as an all embracing basis for obligation; the bald promise was enforceable in covenant only if it met the formal requisites. A promise to pay money was enforceable in debt if something of value had been given to support the claim; debt, in short, looks to have been founded as much on restitutionary notions as on the force of promise-keeping. Promise-keeping seems to have been recognized as much in tort as in anything that looked like contract. And, even *assumpsit*'s historical force seems to have been the reliance principle: you were liable for the damage caused by someone's relying on your undertaking, but your undertaking could be either a promise or a special occupation or calling. As a matter of history, the promise principle does not seem to explain these various sources for our modern law of contract.

## VI. THE LAW TODAY AND THE LAW TO COME

### A. *The Teleological Conception of Law*

Fried's account is not fully compatible with either the Simple or the Legal Process conception of law, although he relies on both in his argument. There are errant cases and unreconciled rules that undercut his reliance on the Simple conception. And, there are principles and policies at work in contract law that defy attempts to reduce them to the moral principle of promise-keeping.

There is, however, another argument that Fried might want to

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117. *Id.* at 264-66, 273-82.

make. This argument depends on a Teleological conception of an adequate theory of law. We understand, Fried could urge, that the common law changes over time, that its authorities and standards may evolve. Recognizing a general process of change in the common law, we might perceive contract law as developing in a way that could lead us to a version of contract law different from what we now have. In the course of this development, extraneous or foreign elements can be sloughed off, new distinctions drawn, and new categories recognized. If this process of change were sufficiently long or vigorous, then a different law of contracts might be revealed as the ultimate result. In particular, Fried might argue, we should expect that contract law will develop along lines that will ultimately reveal the promise principle as the foundation of contract law.

If one held such a teleological or developmental view of the changes in contract law, then one's criteria for an adequate theory of contract should reflect that view. A theory of law should explain more than just the current state of the law—a state that might, in the long range development of the law, prove merely transitional. An adequate theory must also account for the process of legal development and, ultimately, the end product of that development. That is, if contract law does develop in some teleological manner, then an adequate theory should account for what contract law will become.

Lawyers and legal scholars have been attracted to teleological claims about the law.<sup>118</sup> Scholars of contract law, in particular, have been drawn to teleology. Henry Maine was perhaps the most notable, when he pronounced that the development of civilized societies has been “a movement from Status to Contract,”<sup>119</sup> but others have been no less willing to read some progression of society into the develop-

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118. For a review of the various ways in which American legal scholars have appealed to teleological theories, see Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985). The seminal figure in American legal theory's discussion of legal evolution is surely Holmes. See *id.* at 51-55; Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984). For a reprise of the impact of the idea of evolution on English legal thought, see P. STEINER, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980). Herbert Hovenkamp has advanced a more involved analysis of the idea of evolution and its role in legal theory, criticizing Elliot and others for failing to distinguish evolutionary models, properly so called, from developmental models more generally. See Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985). Precision of thought also requires distinguishing between the Teleological conception and evolutionary or other developmental ideas. Teleology implies development and is consistent with any of a variety of developmental mechanisms. What is distinctive about teleology, however, is its idea of development because of or toward some identified goal, value, purpose or final point.

119. H. MAINE, *ANCIENT LAW* 170 (4th ed. 1870).

ment of a system of contract law.<sup>120</sup> To some extent, at least, this can be explained by the fact that lawyers are confronted with clear instances of change in legal doctrine. It is common to remark on the development of a new rule, or the new extension of an old one. Conversely, we may trace legal language, procedures, and doctrines back to their points of origin and contrast the beginning point with the current state of affairs.

What we have seen of contract's history tends to confirm this. Contract seems to have emerged, as suggested above,<sup>121</sup> from an earlier congerie of writs, no one of which served the earlier English legal system in the same way that contract serves our current system. Doctrines, it should be noted, have also developed. Consideration seems to have grown out of an amalgam of the different procedural antecedents of contract.<sup>122</sup> Promissory estoppel can be seen as a response to the inadequacies of a rigid application of the consideration requirement.<sup>123</sup> Constructive conditions became favored by courts as a way of organizing and regulating contract behavior, but constructive conditions, in turn, required ameliorating doctrines like substantial performance.<sup>124</sup>

Lawyers and judges expect that the common law will be dynamic: its doctrines will change to meet new social situations. We can trace changes in the development of contract law leading up to its present state and anticipate that it will continue to change from the present on. If we conceive of the law of contracts as fundamentally adaptive, then we should expect that an adequate theory of the law of contracts must allow for change and should articulate the dimensions along which change will likely occur. The legal community's stock in trade further includes the notion that aspects of our legal system may be evaluated as being appropriate or inappropriate for the times. Not only do lawyers attend to the timeliness of some rule or institution, they are also attracted to the idea that what is now at hand is in some way better than what we had before, that the course of legal change has been good and that the last stages in that development are better than the earlier points. It is not at all unusual for lawyers and legal scholars to characterize a rule as archaic, a procedural form or limitation as anachronistic. In general, legal scholars are quite shameless in talking about the "genius" or "wisdom" of the common law,

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120. See, e.g., F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 1-14, 18-35 (1970).

121. See *supra* notes 115-17 and accompanying text.

122. See, e.g., J. BAKER, *supra* note 65, at 271-93.

123. G. GILMORE, *supra* note 32, at 60-66.

124. A. FARNSWORTH, *supra* note 35, at 576-96.

reflecting a belief in its adaptive qualities.<sup>125</sup>

### B. *Fried's Reliance on the Teleological Conception*

Fried does not state that he has a teleological vision of contract law, but he commits himself in *Contract as Promise* to the corresponding view about the nature of an adequate theory of contract. On one occasion, he claims explicitly that the law of contracts is moving toward a particular state in which the morality of promise-keeping will play a more direct role in judicial decisions. He asserts that contract law's movement "suggests that we may have in the not too distant future a more candid set of principles to determine which promises should be enforceable in terms of the fairness of each type."<sup>126</sup> Moreover, two features of Fried's writings indicate that the quoted passage was not merely a chance remark. First, certain salient elements of Fried's treatment of contract remedies indicate a Teleological conception of contract law. Second, in another essay Fried has argued for something very much like a teleological view of the common law.<sup>127</sup> These features indicate that Fried's theory can be understood as an effort to explain how contract law will develop and what it will become. More particularly, if Fried relies on a Teleological con-

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125. See, e.g., Chief Justice Shaw's ringing prose in his opinion for the court in *Norway Plains Co. v. Boston & Maine R.R.*:

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provision, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it . . . .

Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances.

67 Mass. (1 Gray) 263, 267-68 (1854).

126. C. FRIED, *supra* note 7, at 39. Fried points, in the same passage, to two forces which drive that "movement:" First, decisions and statutes that lend "validity to types of promises whose legitimacy had been in doubt under the doctrine of consideration." *Id.* And second, "a more open willingness to stigmatize certain promises as unfair or unconscionable and to deny enforcement on that ground rather than on the ground of insufficient consideration." *Id.*

127. See *infra* note 138 and accompanying text.

ception of contract law, then we would understand his claim along the following lines: The promise principle explains the future development of contract law, and the form which contract law will come to have will reflect the promise principle as contract's moral foundation.

### 1. THE PURITY OF REMEDIES

If Fried's theory depends on a Teleological conception of contract law then we should find, lurking in his treatment, appeal to some notion of a "true" structure of contract law, which will emerge through some sequence of developments. There is substantial evidence from his treatment of contract remedies that Fried has an argument of this teleological sort in mind.

Consider the emergence of promissory estoppel, perhaps this century's most significant development bearing on the scope of contractual liability. From its initial application to gift promises it now provides a recovery for parties who would otherwise be frustrated by various formal requirements or doctrinal technicalities. Thus, expanded use of promissory estoppel poses a challenge for the contract theorist—either one acknowledges the doctrine as a significant addition to our law of contracts, such that an adequate theory must include it, or one rejects it as an unacceptable growth, a malignancy to be excised, or at least contained. Fried rejects the doctrine. If its effect is to make enforceable a promise, properly so called, then it is in accord with Fried's view of the obligation to keep one's promises. But where detrimental reliance is thought to warrant recovery for unaccepted offers, or other commitments that are not true promises, promissory estoppel is improper.

As measured by prevailing opinion, Fried's position is plainly unorthodox. The Restatement (Second), for example, states that a promise made enforceable by the promisee's detrimental reliance is a *contract*.<sup>128</sup> But Fried's argument is not entirely without foundation. Recent developments have cast the prevailing acceptance of promissory estoppel into doubt. First, in a notable case the court relied in its decision on a distinction between enforcing a contract and enforcing a promise under promissory estoppel.<sup>129</sup> The parties were still in the process of negotiating their final agreement, and the plaintiff relied to his detriment on the promises of defendant's agents that a deal was forthcoming. If there had to be a contract for the plaintiff to recover, his action would have failed. But, the court instead gave a remedy for the breach of various promises that had been made by the defendant

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128. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment e (1979).

129. See *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

during the negotiation process. Fried makes much of the court's distinction between an action for a broken contract and one for promises wrongfully broken to support his claim that contract's foundation is the promise principle and not reliance.<sup>130</sup>

Further, in recent approaches to the question of remedies, there is at least some evidence that a similar distinction is being made between providing a remedy for a breach of contract and giving a recovery for the breach of a promise under promissory estoppel. Fried makes much of the standard remedy for breach of contract. In articulating his view of contracts, he asserts:

If I make a promise to you, I should do as I promise; and if I fail to keep my promise it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this proposition appears as the expectation measure of damages for breach.<sup>131</sup>

In an action for breach of contract the standard measure of damages is, as Fried notes, what is called the *expectation* interest.<sup>132</sup> Sometimes also termed the "benefit of the bargain," this is the amount necessary to put the injured party in as good a position as he would have been *if* both parties had completed their performance under the contract.<sup>133</sup>

We may contrast the expectation interest with two other measures of the injured party's damages: the *reliance* and the *restitution* interests. Awarding the injured party his reliance interest as a measure of his damages would give him the amount he was out of pocket in reliance on the breaching party's promise; awarding him his restitution interest would pay him back for the benefit he had conveyed to the breaching party before performance came to a halt.<sup>134</sup> In a contract action where the injured party's expectation cannot be calculated with any reasonable certainty, the reliance or restitutionary interest might be used as an alternative measure of damages.

Apparently Fried feels that there is some norm of fairness relating to promise-keeping that would compel awarding the expectation measure of damages for breach of promise. He does not, in *Contract as Promise*, attempt to articulate either the nature or the source of that norm. But, whatever it might be, the alleged primacy of this norm of fairness is challenged by developments in promissory estop-

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130. C. FRIED, *supra* note 7, at 21-27.

131. *Id.* at 105.

132. *Id.*

133. See A. FARNSWORTH, *supra* note 35, at 839.

134. *Id.* at 839, 904-14.

pel. There, the trend is to limit recovery to the extent of the injured party's reliance. In its early development, courts characteristically awarded the disappointed promisee her full expectation on a suit for promissory estoppel.<sup>135</sup> More recent courts, however, have been reluctant to award the full value of the promise when the reliance is considerably less. Instead, courts have been satisfied to limit the promisor's liability to the extent of the promisee's actual detriment.<sup>136</sup> The same Restatement (Second) which claims that promises enforced are, indeed, contracts has also enshrined this modern trend regarding remedies: "The remedy granted for breach may be limited as justice requires."<sup>137</sup>

In short, the expectation measure, while normal for damages on the contract, is not the universal remedy for the breach of a relied-upon promise. The recent trends regarding promissory estoppel can be read as establishing a reliance measure of damages for that claim instead of an expectation measure. Fried claims that the expectation interest is the fair and appropriate remedy for a breach of contract. If the appropriate measure of damages for detrimental reliance is something other than the expectation interest, that might show, in Fried's view, that promissory estoppel is no part of contract properly so called. Similarly, a trend in the law away from using the expectation interest as the measure of damages for promissory estoppel would indicate that contract is moving to purge itself of elements that are not properly part of contract.

So perhaps Fried could argue that these developments in the law indicate that contract law is evolving towards a purer vision. This purer vision relegates promissory estoppel to its proper place and keeps contract law, the argument might run, to that which is consistent with the promise principle.

## 2. THE CUNNING OF REASON

In *Contract as Promise*, Fried does not frame his argument for the promise principle in anything like the teleological or developmental form sketched above. He only hints, in his discussion of remedies, at the idea that contract law is ridding itself of foreign elements. In another place, however, he has advanced a claim about the nature of legal change and development which, when joined with his argument that the promise principle is the moral foundation of contract law,

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135. See, e.g., *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

136. See, e.g., *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1966).

137. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

leads to the claim that contract law is developing towards a purer form.

Fried has argued<sup>138</sup> that law is "a moral science" and that in determining the law, judges decide as moral agents.<sup>139</sup> That judges are moral agents means, for Fried, that they respond to moral arguments and that one way to get a judge to make a particular decision is to make that decision the correct conclusion for a moral argument.<sup>140</sup> From this characterization of law as a moral science and judges as moral agents it follows, he claims, that

an understanding of correct moral arguments provides for understanding why the common law—that is, the system of decisions by common law judges—is what it is. It also provides an understanding of why the common law changes. For though we may agree that moral arguments themselves do not change—that is, an argument is not correct at one time and incorrect at another—the circumstances to which an argument applies change, and the combination of correct arguments and changed circumstances will provide an account of changing conclusions, of change and development in the common law.<sup>141</sup>

We can recast Fried's argument along the following lines. Let us suppose that there are such things as correct moral arguments. Let us further suppose that advancing a correct moral argument to a judge with respect to a particular legal controversy will incline the judge to decide the case in accordance with the conclusion of that moral argument. If there are moral norms at work in the law, then we should expect judges to decide cases in accordance with these norms. Moreover, as decisions are made, they become precedents for making similar decisions in similar cases. It follows that we should expect a general tendency both toward common law decisions that are morally correct and toward a common law that accords with moral norms. The development of the common law, in sum, should be a development towards a moral law.

Fried's claim about the force of moral arguments in the common law bears on his theory of contract law because he also contends that the foundation of contract is our moral obligation to keep our promises.<sup>142</sup> A valid argument that a contract should be enforced because of the promise principle will be, on Fried's view, a correct

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138. Fried, *The Law of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980).

139. *Id.* at 336.

140. *Id.* at 336-39.

141. *Id.* at 338.

142. See *supra* notes 23-27 and accompanying text.



moral argument. Other things being equal, that should lead the judge as a moral agent to enforce the contract. More particularly, using the expectation interest as the measure of damages caused by a breach is also the conclusion of a correct moral argument, and its moral status should incline the judge to that remedy. We should expect, therefore, that common law judges will always be inclined, as moral agents, to enforce contracts and to award the benefit of the bargain as a remedy. So, other things being equal, the moral correctness of holding promisors to their promises should be a force of change in contract law. In sum, we should expect that contract law will change over time and become more moral. And, because Fried views the moral force of contract law as the moral obligation to keep one's promises, we should expect that contract law will change over time by becoming more purely the enforcement of promises.

### C. *Assessing the Teleological Conception*

It is at least arguable that the legal community's predilection toward a Teleological conception of legal change is fundamentally based on superstition. Dr. Pangloss, after all, has made us skeptical of teleological claims.<sup>143</sup> Moreover, we may note certain egregious deficiencies in teleological claims as they are commonly advanced to justify some contention about politics or history.

To claim that some societal institution is developing towards a particular end state invites skepticism on several grounds.<sup>144</sup> We wonder, first, why the proponent of the teleological claim has identified *that* specific end state as the developmental terminus. In particular, we wonder whether there is a disguised element of advocacy lurking about in that identification—perhaps the teleological claim is less description than exhortation. We are troubled, moreover, about the kind of causal mechanism that is supposed to be leading the institution in question toward that specific end state. Finally, even if there are some indications that the institution is in some respects closer to its terminus than it was previously, we might also question if there are not other respects in which the institution is further distanced from its purported goal. The teleological proponent must show not only that some causal factor is leading the institution toward the alleged end, but also that other factors are not simultaneously leading the institution *away* from the specific end that has been asserted. Perhaps the overall drift is toward another resolution instead.

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143. VOLTAIRE, *CANDIDE AND OTHER WRITINGS* (H. Block ed. 1956).

144. For a comparable analysis of the merits of teleological claims, see E. NAGEL, *supra* note 15.

There are ample grounds, in short, on which to distrust teleological claims about legal development and, more particularly, about development in contract law. Nonetheless, some reflection on our expectations relating to the judicial process will give us pause, at the least, before we can dismiss all teleological claims about the common law. The various bases on which the legal community evaluates judicial decisionmaking lend some support to a teleological vision of common law development.

Judges have an obligation to decide cases and to decide them according to law.<sup>145</sup> The legal community also expects judges to justify the decisions they reach by reference to the various legal authorities that are applicable and relevant. We expect that courts will generally adhere to past decisions and that the common law will generally provide for continuity and stability of doctrine. Hence, our obligations of precedent: courts will stand by their own prior decisions; lower courts will follow the authority of the highest court of the jurisdiction; like cases will be treated alike at every level of hierarchy. In problematic cases, where the rule embodied in some line of cases is hard to discern or uncertain as to its implications for the case at hand, we might expect that judges will appeal to principles and policies of the law.<sup>146</sup> These legal standards serve to explain and rationalize the past decisions and to aid the court in clarifying or extending the existing law. For, even when the authoritative cases are uncertain or indeterminate, a court can remain faithful to the demands of reasoned decision-making in a precedential system by following the principles or policies that inform those past decisions.

Courts will generally adhere to existing cases and rules. But we also expect that the common law will change over time and across different circumstances.<sup>147</sup> We expect that judges will participate in this process of change. Moreover, as judicial decisions work changes in the law we expect that judges will justify their decisions in much the same manner and by reference to the same general sources and warrants as are used by courts to justify a decision according to precedent.<sup>148</sup> Most significantly, we expect that courts will rely on standards of the law to justify not only the extension of a rule to a new situation, but also the employment of a rule where none had previously existed and even the substitution of a new rule for an old. So, it is part of the legal community's understanding of the judicial process

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145. See generally *LAW'S EMPIRE*, *supra* note 21; N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

146. See *supra* text accompanying notes 75-82.

147. See, e.g., G. CALABRESI, *supra* note 91, at 3-4.

148. See, e.g., H. HART & A. SACKS, *supra* note 77; N. MACCORMICK, *supra* note 145.

that courts will properly act in various ways to effect change in the law and that they will rely on legal standards to justify their actions. Generally, we expect that this process of legal development will occur not by any great sea change, but, rather, incrementally and slowly. But we expect that the law will indeed develop.

Given this picture of the judicial process, it is easy to understand how some might view the process as leading, over time, to a teleological development of the common law. For, the standards of the law on which courts will rely in this development can be seen as expressions of values at work in the legal system.<sup>149</sup> By expecting judges to rely on these legal standards in their development of the law, we impose on judges an obligation to further these values. That is, the judicial process itself seems to involve courts in an effort to ensure the place of these legal values. So, we would expect that over time the judicial development of the common law will be a development toward the greater exemplification of the system's values. In short, at an abstract and quite general level, the judicial process, as it is commonly understood by the legal community, suggests a teleological perspective on legal change.

This abstract and general description of legal development obscures a number of complications. First, this description of the judicial process presupposes that the set of legal standards is relatively stable over time. Only if the same set of principles and policies that guide judges at the beginning of the development process also guide courts at its end can we expect that the overall process will further those values that are embodied in the law's standards. If the set of standards changed significantly from one judicial era to the next, then the most that could be said of any change in the law is that it furthers some particular set of values. The next change, although perhaps furthering *some* set of standards, might not necessarily further the same set as the previous change. Thus, although we could observe legal change, we might not achieve legal development toward some end result.

Second, the description of legal development in terms of the judicial process supposes that the set of legal authorities and standards is coherent in some important sense. In other words, this account of legal change supposes that the standards of the legal system are not in serious conflict. For, even if some legal change favors one value, it remains possible that another change will further another, inconsis-

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149. It is important to note that, by pointing to values at work in the legal system, one is not necessarily claiming that the legal system is fundamentally moral, nor that law and morality are necessarily intertwined.

tent value. Overall, then, there might be substantial change in the legal system without any actual progress toward some resolution of the conflict; change without true teleology.

Moreover, we understand that the judicial process of developing the law is only one aspect of legal development. Legislative enactments might well change the set of standards operative in the law. It is common to observe some statute or other that states as its purpose the changing of the common law. And statutes, as they are interpreted by courts, are routinely treated as reflecting at least a policy that the legislature favors, if not also a principle. Thus, the possibility of enactments means that the set of standards may change over time, and further, that the standards of the law gain or lose coherence.

It is beyond the scope of this article to consider whether, when all is said and done, a Teleological conception of the common law of contracts is tenable. For my purposes, it is enough to note that Teleological conceptions have been attractive to theorists of the common law, and that the legal community's expectations of the judicial process provide fertile ground in which a teleological view might take root. As a result of our understanding of the judicial process, we expect that where we are now in the law of contracts owes its character to where we have come from, and we expect that where we will be a generation or two from now will continue to show the influence of past generations. We suspect that the history of contract law will continue to exercise substantial influence over the future development of contract law.

#### D. *Problems with Fried's Reliance on the Teleological Conception*

Even understood as a teleological claim about contract law development, Fried's promise-based theory is open to challenge. There are good grounds to doubt any claim that the moral obligation to keep our promises can explain the future developments of contract.

A number of grounds were identified above on which one might well feel skepticism about a claim that legal change is, in fact, a matter of teleology.<sup>150</sup> We might wonder about the proponent's identification of the particular end of the legal development; we might doubt the causal mechanism that is supposed to lead us to the end result; and we might question whether, on closer inspection, the drift in the law really is toward the supposed terminus. In particular, on this last ground for skepticism, we might ask if there are not other factors that are leading the law of contracts away from a law based on promise-

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150. See *supra* text accompanying notes 144-45.

keeping. Fried has undertaken to satisfy our doubts on the first two counts. *Contract as Promise* aims to identify the moral force of promise-keeping in contract law. Fried's essay on legal change provides us with the causal mechanism by which contract law might be said to develop towards a unified structure based on promise-keeping.

Recent developments in contract remedies, however, undermine the claim that contract law really is progressing toward an end result in which the promise principle reigns supreme. Fried appears to rely on the suggestion, considered above, that developments in remedies are evidence that promissory estoppel will ultimately be weeded out of contract law. But, promissory estoppel is not the only aspect of contract law where a trend in remedies can be observed. A similar trend can be observed in a line of cases concerning promises made enforceable because of "moral consideration."<sup>151</sup> It can be seen that for these cases, as for promissory estoppel, the trend is toward using a different measure of damages than the expectation interest. This trend calls into question Fried's suggestions about the emerging primacy of the expectation interest as the measure of damages, and, hence his contention that promissory estoppel should be exiled from the realm of contract law.

Consider the following situation:

A married woman renders household services without compensation over a period of years for *B*, a man of eighty living alone and having no close relatives. *B* has a substantial net worth. Well after the woman stopped providing the household services, *B* assures her—in all seriousness and on several distinct occasions—that she would be well compensated for the services. The reasonable value of her services is not in excess of \$6000.<sup>152</sup>

Under the bargain theory of consideration, *B*'s promise is not enforceable: because *B* made his promise well after the woman rendered the services, the services did not induce the promise, and hence the parties did not bargain for the promise.

Two important lines of cases, however, have spawned an alternative rule that would hold *B* (or his estate) liable for his promise even though traditional doctrine would have found nothing like consideration. One line of relatively common cases is applicable when the services rendered to *B* are life- or health-saving. *B* is said to have incurred a moral obligation to repay his benefactor for any injury suffered by

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151. See *supra* text accompanying note 49. See generally A. FARNSWORTH, *supra* note 35, at 52-59.

152. The example is taken from *In Re Hatten's Estate*, 233 Wis. 199, 288 N.W. 278 (1940). See also RESTATEMENT (SECOND) OF CONTRACTS § 86 comment i, illustration 12 (1979).

the good samaritan in saving *B*, and that obligation will make enforceable *B*'s promise.<sup>153</sup> Another trend, limited initially to Wisconsin, found a moral obligation even when the services rendered were mundane and less dramatic than saving *B*'s life.<sup>154</sup> The Restatement (Second) of Contracts has followed Wisconsin's lead, although eschewing talk of moral consideration, and would make *B*'s promise enforceable.<sup>155</sup>

Fried has rejected the bargain theory of consideration as incoherent and has urged that promises, even if gratuitous, be enforced. Moreover, he explicitly approved the line of cases where *B*'s promise is given for life- or health-saving services.<sup>156</sup> So, it would seem that he would be committed to enforcing *B*'s promise. These cases, however, challenge the primacy of the expectation interest as the proper measure of damages. Therefore, they undercut any argument that Fried might make that the promise principle is ascendant.

Let us suppose that the woman's services are worth not more than \$6,000. If *B* promises to pay her \$25,000, the consensus of Wisconsin and the Restatement (Second) is to enforce *B*'s promise, giving the woman her expectation interest. But, if *B* promises (with equal seriousness and before witnesses) to give her his entire estate, where his estate is worth a few million, then the Restatement (Second) would give her only the reasonable value of her services, i.e., only \$6,000.<sup>157</sup> In a procedurally complicated case the Wisconsin court reached essentially the same result.<sup>158</sup> What is significant about this development is precisely that the damages awarded were not based on her expectation interest. Her award was limited, instead, to the reasonable value of the services she gave to *B*, plausibly a restitutionary measure instead.

In other words, here is a legal development in which the development of the promise principle seems thwarted: its alleged corollary, the expectation measure of damages has been rejected by courts even

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153. See, e.g., *Webb v. McGowin*, 27 Ala. App. 82, 168 So. 196 (1935), *cert. denied*, 232 Ala. 374, 168 So. 199 (1936); see also *RESTATEMENT OF RESTITUTION* § 116 (1937).

154. See, e.g., *In Re Hatten's Estate*, 233 Wis. 199, 288 N.W. 278 (1940) (promisee provided housekeeping services).

155. *RESTATEMENT (SECOND) OF CONTRACTS* § 86 (1979).

156. C. FRIED, *supra* note 7, at 32-33.

157. See *RESTATEMENT (SECOND) OF CONTRACTS* § 86 comment i, illustration 13 (1979).

158. See *In re Gerke's Estate*, 271 Wis. 297, 73 N.W.2d 506 (1955). The court in *Gerke* held that moral consideration made the promise enforceable but further reasoned that a promise to pay out the entire estate had to meet the requirements of a valid will. Finding that the promise in question did not meet those requirements, the court awarded the reasonable value of the promisee's services on a theory of quantum meruit, or implied contract for services.

as they expand the enforcement of promises beyond the confines of the traditional consideration requirement. *B*'s promise is enforced on its terms only if the value of *B*'s promise is not disproportionate to the value of the services rendered; otherwise, the enforcement may be limited to the reasonable value of the services. In short, in this line of cases the restitutionary principle seems ascendant and the promise principle denied. Even were we to view contract law in the full scope of possible legal developments, it does not appear that the promise principle can explain the full range of contract law.

## VII. AN ADEQUATE THEORY OF THE COMMON LAW

Lawyers who have theorized about the common law's various parts have not generally pursued the question, "What is the law of contracts?" "Or of torts?" "Or of whatever subdivision they are exploring?" Perhaps as a result, they have also failed to attend to important differences among the various conceptions of the common law. I have argued that the three conceptions on which Fried relies each generate different criteria for an adequate theory of contract law.<sup>159</sup> To some extent at least, Fried's argument trades on these differences.

It is the Simple conception that renders initially plausible Fried's hypothesis that contract's structure can be related in some insightful way to promise-keeping, a moral institution. For, that conception supports two assumptions that are important to Fried's argument: first, that we can take at face value the references to promise-keeping that adorn judges' opinions and, second, that the law of contracts, which is to be related to the promise principle, is a relatively stable and well-agreed upon enterprise. To take seriously judicial references to promise-keeping also commits the theorist, on pain of inconsistency, to take seriously the other doctrines and authorities of contract law to which judges also recur. Some of these, however, cannot be squared with the promise principle. To reconcile this discrepancy between the promise principle and the law as identified by the Simple conception Fried must therefore appeal to a more elaborate conception of the law of contracts than is provided by the Simple conception alone.

His argument indicates that Fried relies on both the Legal Process conception, with its structure of principles and policies, and a Teleological conception with its projection of a law of promise-keeping as the end point of contract's development. Recourse to either of

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159. See *supra* text accompanying notes 34-41 (the Simple conception), notes 75-82 (the Legal Process conception), & notes 118-25 (the Teleological conception).

these conceptions, however, burdens Fried with a further requirement: he must demonstrate the primacy of the promise principle over other values at work in contract's development, if he is to contend that contract law is based on, or will ultimately be based on, the moral obligation of promise-keeping. An examination of contract's history and current trends indicates that the promise principle is not the only value at work in contract law. Further, those trends do not demonstrate that promise-keeping is, in any relevant sense, the dominant value at work in contract's development. Finally, examining certain trends in the area of damages leads to skepticism about Fried's claim that promise-keeping is emergent as the dominant force in contract law.

Fried's argument, as it has been developed, lacks force because he has failed to take account of the differing characteristics of contract law that would be required to ground an adequate theory under each of the different conceptions to which he appeals. This essay is not the place to articulate and defend a complete set of criteria for an adequate theory of contract law, but Fried's failures suggest a few rough and ready generalizations about what constrains any adequate account of the common law or of its parts.

First, an adequate account should reflect the importance of history. The current state of contract law will likely reflect not just the workings of some principle or set of principles, nor just the current set of judgments about questions of policy. Rather, we should expect that contract's present set of authorities will be drawn from contract's previous developments. History seems inescapable in a precedential system of law: current controversies should be decided by reference, among other things, to the way in which past controversies were decided. This suggests that any ahistorical account of the common law will be prone to difficulties.

Second, a theory of the common law should acknowledge the prospect of judicial willfulness. Judges are sometimes led to decide cases and even to create doctrine on the strength of their perceptions of fairness. Just what grounds their perceptions of fairness is uncertain, but those perceptions are likely to draw on a number of sources—principles and policies already at work in the law, moral sentiments, perhaps even class prejudices. Sometimes, a number of judges will strive toward the same result, without being aware of other similar decisions. On occasion, one salient case will precipitate other decisions. As a result, any theory that attempts to reduce developments in a part of the common law to the impetus of a single operative norm seems likely to be undermined. In deciding contract cases,



judges may well respond to the force of promise-keeping, but it appears that they respond to other norms as well.

Third, an adequate theory of some part of the common law should accommodate the interplay between substantive and remedial law. It is sometimes urged that the two are necessarily equivalent, that there can be no remedy where there is no substantive right and, further, that there can be no more remedy than the right entails.<sup>160</sup> Fried relies on a fundamental connection between the promise principle and the expectation measure of damages. At any point in contract's development, it may be possible to reconceptualize the existing set of rights and remedies so that some such equivalence is exhibited. But in general this possibility belies the myriad ways in which courts can expand and refine legal remedies without strict attention to the substantive rights which might be supposed to ground those remedies. Moreover, not only can judges expand remedies while appearing to presuppose the existing set of substantive rights, those remedies, once expanded, can provide a spur to further development of the rights. In contract, the development of promissory estoppel and of moral consideration has, at times, exhibited this kind of dynamism. Fried's account founders, on occasion, because he is prepared to assume uncritically the definitional connection between contract and the expectation measure of damages for breach. But contract's history is rife with examples of remedial developments that have exceeded the scope and limit of the promise principle. Any theory of contract law that does not accommodate the prospect that substantive and remedial developments in the law can follow independent paths seems likely to overlook crucial developments in the law.

These generalizations should bear on our evaluation of any theory of the common law or its parts. They are particularly forceful when we consider a theory such as Fried's account of contract because his account depends on a *single* moral principle. His ambition runs beyond the task, difficult enough, of providing a moral account of contract law; he aims to explain contract in terms of just one moral principle, the obligation to keep our promises. Contract's history, its common law development by judges, and the interaction between its rights and its remedies make it all the less likely that one and only one principle should explain the full variety of its developments.

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160. See, e.g., *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).